Filed 8/9/10 Prince v. Superior Court CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JEFFREY A. PRINCE et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THOMPSON BUILDING MATERIALS et al., Real Parties in Interest.	B224284 (Los Angeles County Super. Ct. No. YC059602)

ORIGINAL PROCEEDING. Petition for writ of mandate. William G. Willett, Judge. Petition granted.

Greenberg, Whitcombe & Takeuchi, LLP, John D. Whicombe, Mark K. Worthge and Michael J. Weinberger, for Petitioner.

No appearance for Respondent.

Prenovost Normandin Bergh & Dawe, APC, Michael G. Dawe and Kristin F. Godeke, Jr., for Real Party in Interest, Thompson Building Materials.

Petitioners, Jeffrey and Sherry Prince (plaintiffs) challenge an order of the respondent superior court granting the petition of Thompson Building Materials (Thompson) to compel arbitration. We agree with plaintiffs that Thompson waived its right to compel arbitration. Utilizing the applicable standard of review (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 426; *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557), we conclude the respondent court's order granting Thompson's motion is not supported by substantial evidence. Accordingly, we grant plaintiffs' petition for writ of mandate.

FACTS AND PROCEDURAL HISTORY

This construction defect case arose from the construction of plaintiffs' home and guest house in Redondo Beach. The construction was overseen by a general contractor. In 2005, Thompson sold "Colonial Cream Patio Flag" stone paving to Simich Construction, a subcontractor that was installing paving around plaintiffs' pool deck. Plaintiffs allege that the stone paving on the pool deck "decomposed, cracked and deteriorated due to latent defects," and that debris from the deteriorating paving material damaged other improvements in the pool deck area, including the pool filters and pump system. The defects in the paving material also created a trip and fall hazard. Thompson contends its sales representatives were not told plaintiffs intended to use the stone on a pool deck, nor did Thompson make any representations concerning the stone's suitability for any particular use.

On April 22, 2009, plaintiffs sued Thompson, Rusher Air Conditioning (not a party to this proceeding) and Doe defendants for negligence and breach of implied warranties. Thompson answered the complaint on May 29, 2009, and Rusher answered the complaint on June 11, 2009. At a case management conference on September 29, 2009, the court found the case was at issue and set the case for trial on April 19, 2010.

On March 9, 2010, (a week before the discovery cutoff date, and just over a month before the date set for trial), Thompson filed an ex parte application for an order shortening time to file a formal petition to compel arbitration. Thompson also sought a

stay of the litigation (to preserve the discovery deadline should the motion be denied). The superior court granted the request for an order shortening time.

In its motion to compel arbitration, Thompson asserted that its counsel "was recently made aware" of an arbitration provision in the "Terms and Conditions of Sale" set forth on the reverse side of invoices Thompson submitted to Simich Construction.[1] Although Thompson provided the invoices to plaintiffs in response to discovery requests, "the back sides of these invoices had inadvertently not previously been copied." Counsel first became aware of the arbitration provision on February 12, 2010. Counsel showed the invoice to plaintiffs' counsel at a court-ordered mediation on February 12, 2010.

In their opposition to the motion, plaintiffs noted that Thompson had waited until "almost one year into litigation of this action and on the eve of trial" to file its motion. Plaintiffs argued that by participating in the litigation, including having the benefit of discovery that would have been precluded by AAA rules, Thompson had waived its right to compel arbitration. Thompson replied that it had moved to compel arbitration "at the earliest possible date," and asserted that its "failure to provide the back of the invoices resulted from clerical error."

Thompson's motion was heard March 23, 2010. Initially, the court was inclined to deny the motion on the ground that plaintiffs had been prejudiced by Thompson's delay in seeking arbitration:

> " . . . Thompson knew or should have known that there was an arbitration provision in the invoice, since they provided the invoice. And whether or not the defendant communicated that to its lawyer, it is still imputed to its lawyer. So, from the day of the filing of this answer, I am assuming that Thompson knew of this arbitration clause in the invoice and elected not to seek arbitration. Now we are on the eve of trial and to split the case and require the plaintiff to basically try

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[1] The arbitration clause states: "9. ARBITRATION OF DISPUTES–Any and all disputes between Buyer [Simich] and Seller [Thompson] arising concerning [sic] product acceptability, defects, delivery delays or back charges shall be resolved in Orange, Riverside, San Diego, San Bernardino or Los Angeles County by binding arbitration before the American Arbitration Association, pursuant to its then current Rules for Commercial Arbitration, and judgment on such award may be entered in any court having jurisdiction."

> it twice seems, to me, to be prejudicial to the plaintiff. You would have to try it twice because there is a second defendant, Rusher Air Conditioning, which will go to trial anyway. And if the arbitration had gone forward on an expeditious time scale, the arbitration could have been completed by now which might have resolved the entire litigation."

Thompson's counsel told the court that although he had "known of these invoices" and had been "litigat[ing] these invoices for probably 20 years," his associate (to whom he had delegated the responsibility of responding to plaintiffs' discovery) had not, and "she simply didn't know any better in terms of knowing there should have been a back side on [the invoice]."[2]

The court took the matter under submission, and, on March 24, 2010, issued a minute order granting Thompson's motion to compel arbitration. The court did not state reasons for its ruling in the minute order, nor are any reasons apparent from the reporter's transcript of the motion hearing.

The court denied plaintiffs' motion for reconsideration on April 22, 2010. This petition followed.

DISCUSSION

A court may deny a petition to compel arbitration on the ground that "[t]he right to compel arbitration has been waived by the petitioner . . . ." (Code Civ. Proc., § 1281.2, subd. (a).) A party may waive the right to compel arbitration by failing to demand arbitration within a time limit specified for that purpose in a statute (*Freeman v. State Farm Mutual Auto Ins. Co.* (1975) 14 Cal,3d 473, 482-487) or in the arbitration contract itself. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 321.) Where no statute or contractual provision specifies a time limit within which a party is required to demand arbitration, a party must still demand arbitration within a reasonable time. (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 30.) "This rule is an application of the general principle of contract law articulated in Civil Code section 1657,

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[2] In its return, Thompson states that the error was "due to an inadvertent mistake by a lower level employee at [Thompson]."

to the effect that, '[i]f no time is specified for the performance of an act required to be performed, a reasonable time is allowed.' [Citation.] '[W]hat constitutes a reasonable time is a question of fact, depending upon the situation of the parties, the nature of the transaction, and the facts of the particular case.'" (*Id.* at p. 30, citing *Sawday v. Vista Irrigation Dist.* (1966) 64 Cal.2d 833, 836.)

Although there is no uniform test for determining whether a party's conduct amounts to a waiver of the right to arbitrate, the courts have formulated a list of factors that are relevant in making that determination. These include '"(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party."'" (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196, quoting *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992.)

Thompson's conduct in this case satisfies virtually all of these factors and compels a finding of waiver. Thompson did not raise arbitration as an affirmative defense in its answer. (See *Guess?, Inc. v. Superior Court, supra*, 79 Cal.App.4th at pp. 557-558.) Thompson participated in the litigation for nearly a year. In opposition to Thompson's motion, plaintiffs' counsel submitted a declaration in which he listed 54 items plaintiffs considered to be "significant litigation activities" by the parties. Nearly half of these items are discovery propounded by Thompson. The parties designated expert witnesses; Thompson's expert inspected plaintiffs' property in June 2009 and March 2010. The parties also participated in a case management conference in September 2009 and court ordered mediation in February 2010. Suffice it to say, "the litigation machinery has been

substantially invoked" and the parties "were well into preparation of a lawsuit" before Thompson notified plaintiffs that it would seek to compel arbitration.

Thompson suggests that plaintiffs were not prejudiced by its delay in seeking arbitration because plaintiffs' responses to written discovery were "essentially meaningless," no depositions have been taken, and the same amount of discovery has taken place as would have had the matter previously been ordered to arbitration, because the AAA Rules "provide for the parties to create their own discovery plan." However, as plaintiffs point out, under the AAA rules any discovery is at the arbitrator's discretion upon a party's request, there is no absolute right to the scope of discovery provided in the Code of Civil Procedure, and the scope of the arbitrator's discovery is limited to the production of documents and information and the identification of witnesses.[3] It is pure speculation to assume that an arbitrator would have allowed the significant discovery that has already taken place in this case.

Finally, plaintiffs take issue with Thompson's assertion that plaintiffs suffered no prejudice as a result of Thompson's delay in seeking arbitration. Plaintiffs argue they were prejudiced "simply by losing the inherent benefits and efficiencies of an expedited arbitration." Moreover, plaintiffs invested a year of their time, and considerable expense, preparing the case for a trial in superior court.

We agree with Thompson that plaintiffs could not assert a breach of warranty claim based on a contract (the invoice), while "disavowing" a contractual provision (the arbitration clause) they do not like. However, plaintiffs have not "disavowed" the contract as Thompson suggests. Rather than utilizing the common means of challenging an arbitration clause—claiming the clause is "unconscionable"—plaintiffs instead claim they were deprived of the benefit they would have gained (an early and expeditious resolution of their case) but for Thompson's delay in seeking arbitration.

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[3] Rule R-21 of the AAA rules for commercial arbitration, provided by Thompson in its reply to plaintiffs' opposition below, states that "At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator *may* direct [¶] (i) the production of documents and other information, and [¶] (ii) the identification of any witnesses to be called." (Italics added.)

DISPOSITION

The petition for writ of mandate is granted. Costs of this proceeding are awarded to plaintiffs.

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_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
ASHMANN-GERST